992059 JUN 21 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JOE WALLACE, doing business as Video Liquidators,

Petitioner,

v.

MICHAEL E. WELLBORN, Judge, County Court at Law Judge; LISA SHEPPARD, Department Public Safety Agent; DANNY CONTRERAS, Department Public Safety Agent; SAN PATRICIO COUNTY; DAVID H. AKEN, JR., San Patricio County Attorney,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GREG GLADDEN
TBA NO. 07991300
3017 Houston Avenue
Houston, Texas 77009
Phone: 713/880-0333
Fax: 713/880-4018
Counsel of Record for Joe Wallace

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

49pp

QUESTION PRESENTED

Whether the bald assertion of "evidence gathering for criminal prosecution" by police officers relieves the courts of their responsibility to enforce the well-settled law against mass seizures of presumptively protected speech material without inquiry into whether the facts support a claim the mass seizure was to censor free speech.

LIST OF PARTIES UNDER SUPREME COURT RULES 14.1 AND 29.6

The undersigned counsel of record for Petitioner Joe Wallace certifies that the following list includes the respondents, all prior counsel in the case and all other persons to have a financial or other potential interest in the outcome of this case based on the information reasonably available to the undersigned. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Interested Parties for Respondents:

Lisa Shepherd

Respondent

Danny Contreras

Respondent

J. Bradley Spalding

Prior Assistant Attorney General on Case

P.O. Box 12548, Capitol Station

Austin, Texas 78711-2548

(512) 475-4080

David S. Morales

Current Assistant Attorney General on Case

P.O. Box 12548, Capitol Station

Austin, Texas 78711-2548

(512) 475-4080

LIST OF PARTIES UNDER SUPREME COURT RULES 14.1 AND 29.6 – Continued

Interested Parties for Petitioner:

Joe Wallace

Petitioner

Greg Gladden

Counsel of Record

3017 Houston Avenue

Houston, Texas 77009

(713) 880-0333

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 5

A. The Court of Appeals' application of the protections afforded material presumptively protected by the First Amendment conflicts with this Court's and other Circuit Courts' application and is contrary to this Court's application of the First and Fourth Amendment guarantees to Petitioner 5

B. The Decision of the Court of Appeals is Erroneous 9

C. The Question Presented is Important 11

CONCLUSION 11

APPENDICES

A. OPINION OF THE COURT OF APPEALS ... App. 1

TABLE OF CONTENTS – Continued

Page

B. DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT..... App. 6

C. PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT..... App. 10

D. ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT..... App. 16

E. DENIAL OF REHEARING AND REHEARING EN BANC..... App. 21

F. SEARCH AND ARREST WARRANT..... App. 23

G. AFFIDAVIT FOR SEARCH AND SEIZURE WARRANT..... App. 25

TABLE OF AUTHORITIES

Page

CASES

A Quantity of Copies of Books v. Kansas, 84 S. Ct. 1723 (1964) 8

B.A.P., Inc. v. McCulloch, 994 F. Supp. 1131 (E.D. Mo. 1998), *aff'd*, 170 F.3d 804 (CA8 1999) 7, 8

Chesapeake B&M, Inc. v. Cassilly, 729 F. Supp. 1106 (D. Md. 1990) 8

Cinema Classics, Ltd. v. Busch, 339 F. Supp. 43 (C.D. Ca. 1972) 7, 8, 9

D.P.D. Inv. v. City of Beaumont, 82 F. Supp. 2d 619 (E.D. Tex. 2000) 7, 8

Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989) 5, 6, 8

Heller v. New York, 93 S. Ct. 2789 (1973) 6, 8

Hicks v. Taylor, 153 F.3d 720 (CA4 1998) 7, 9

Lo-Ji Sales v. New York, 442 U.S. 319 (1979) 5, 6, 7

Marcus v. Search Warrant, 367 U.S. 717 (1961) 5, 6, 7

Roaden v. Kentucky, 413 U.S. 496 (1973) 6

United States v. Echols, 577 F.2d 308 (CA5 1978) 7

United States v. Kimbrough, 69 F.3d 723 (CA5 1995) 6

Video News, Inc. v. Texas, 790 S.W.2d 340 (Tex. App.-Houston [1st Dist.] 1990) 9

Video Software Dealers Ass'n v. City of Oklahoma City, 6 F. Supp. 2d 1292 (W.D. Okla. 1997) 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AMENDMENTS AND STATUTES

U.S. Const. amend. I. . . . . *passim*

U.S. Const. amend. IV . . . . . *passim*

U.S. Const. amend. XIV. 2

42 U.S.C. § 1983. . . . . 2, 3

TEX. PEN. CODE ANN. § 43.21 . . . . . 2, 3

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW Petitioner Joe Wallace to file his petition for a writ of certiorari to the Court of Appeals for the Fifth District, on issues of:

QUESTION PRESENTED

Whether the bald assertion of "evidence gathering for criminal prosecution" by police officers relieves the courts of their responsibility to enforce the well-settled law against mass seizures of presumptively protected speech material without inquiry into whether the facts support a claim the mass seizure was to censor free speech.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals (A, App. 1) is reported at 204 F.3d 165 (5th Cir. 2000). The federal trial court granted summary judgment (D, App. 16).

JURISDICTION

The decision of the Fifth Circuit Court of Appeals was rendered on February 8, 2000 (A, App. 1). Petitioner timely filed a motion for rehearing on the decision of the Court of Appeals, which was denied on March 23, 2000 (E, App. 21). Petitioner timely filed a motion for reconsideration en banc, which was denied on March 23, 2000 (E, App. 21).

The jurisdiction of this Court is invoked under 42 U.S.C. § 1983 and 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment I.

United States Constitution Amendment IV.

United States Constitution Amendment XIV, Section I.

United States Code Chapter 42, Section 1983.

Vernon's Texas Penal Code Annotated, Section 43.21 in pertinent part states:

> "(a) In this subchapter:
>
> (1) "Obscene" means material or a performance that:
>
> (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
>
> (B) depicts or describes:
>
> (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or
>
> (ii) patently offensive representations or description of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device

designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value . . . "

TEX. PEN. CODE ANN. § 43.21.

STATEMENT OF THE CASE

Petitioner argues respondents' actions violated his rights guaranteed under the First and Fourth Amendment of the Constitution of the United States of America and as such violated Chapter 42, Section 1983 of the United States Code. The entire adult entertainment industry in Portland was censored out of business in the fall of 1995, including Video Liquidators owned by Joe Wallace, petitioner, when respondents, Contreras and Shepherd, secured several mass seizure warrants and arrest warrants for the owners and businesses of all four adult movie stores in the small town of Portland, Texas.

Respondents' investigation had previously involved the purchase of a few movies or magazines from the various vendors in Portland. Based on the content of those movies, Shepherd prepared the affidavit and the warrant for presentation to County Court Judge Wellborn. Judge Wellborn was not provided with any videotapes, or magazines for review and did not review any of the material seized. Shepherd requested that Police be allowed to seize all material, including all copies, the Police suspected to be obscene under the Texas obscenity statute. Judge Wellborn signed the warrant as requested without reviewing any of the allegedly obscene material, without particularly listing the items to be seized and

without limiting the officer's discretion as to what could be seized. Prior to the seizure, a hearing was *not* held to determine if the material was obscene.

The Police, including Shepherd and Contreas went from store to store arresting those against whom arrest warrants had been secured for the individual sales of movies. The Police carried away thousands of movies from the various businesses, including, 2,143 belonging to Joe Wallace. The Police carried off Wallace's entire inventory of adult oriented entertainment, including, multiple copies of many of the movies in his inventory. Wallace demanded his day in court, the return of his property, and vindication of his rights guaranteed under the First and Fourth Amendment of the Constitution of the United States of America.

After two misdemeanor criminal trials with no convictions or findings that any of his material was obscene and repeated efforts by Wallace to retrieve his property, this suit was initiated. After the filing of this suit and the inability of the prosecution to secure a conviction for any of the obscenity charges lodged against Wallace, all criminal prosecutions were dropped and the two thousand one hundred and forty-three (2,143) movies were returned to him about two and one-half years after the mass seizure.

The trial court granted summary judgment for respondents on the grounds of qualified immunity finding this mass seizure was justified at law because it was for the sole purpose of obtaining and preserving evidence for criminal prosecution of plaintiff and did not require a judicial determination of obscenity (D, App. 16). The United Stated Court of Appeals for the Fifth Circuit

affirmed this decision on the 8th day of February on the same ground (A, App. 1).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision conflicts with *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979), *Marcus v. Search Warrant Property*, 367 U.S. 717 (1961), other cases decided by this Court and other circuit court decisions. There are also several lower courts whose decisions conflict with this Court and need guidance. This case provides the opportunity to resolve disputes among the lower courts on several conflicting issues and give guidance to courts that are unwilling to make decisions because of the ambiguity. The decision below is erroneous and subjects Wallace and similarly situated individuals to deprivation of their First and Fourth Amendment rights.

A. The Court of Appeals' application of the protections afforded material presumptively protected by the First Amendment conflicts with this Court's and other Circuit Courts' application and is contrary to this Court's application of the First and Fourth Amendment guarantees to Petitioner.

Due process demands a higher standard of safeguards when seizing material presumptively protected by the First Amendment to protect against the risk of prior restraint. Material presumptively protected by the First Amendment requires a procedure to "focus searchingly on the question of obscenity" before seizing any material. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989); and *Marcus*, 367 U.S. at 732.

This Court has held three requirements are necessary to "focus searchingly on the question of obscenity" before seizing any allegedly obscene material is constitutional: (1) a judge must review the material believed to be obscene and make a judicial determination if probable cause exists that is obscene, *Lo-Ji Sales*, 442 U.S. at 326; *Roaden v. Kentucky*, 413 U.S. 496, 506 (1973); and *Marcus*, 367 U.S. at 732; (2) the warrant must state with particularity the items to be seized, *Lo-Ji Sales*, 442 U.S. at 325; and *Marcus*, 367 U.S. at 732; and (3) if the seizure is for the purpose to remove from circulation or to destroy the material an adversarial pre-seizure hearing must be held, *Fort Wayne Books*, 489 U.S. 46, 63 (*citing Heller v. New York*, 413 U.S. 483, 492 (1973)). The Fifth Circuit in this case and other lower courts in similar cases have conflicting applications of these clearly established requirements and need guidance in the procedures of implementation.

The first requirement, a judge must review the material believed to be obscene and make a judicial determination if probable cause exists that it is obscene and should be seized, ensures against the prior restraint of nonobscene material. *Lo-Ji Sales*, 442 U.S. at 326; *Roaden*, 413 U.S. at 506; and *Marcus*, 367 U.S. at 732. Determination of which presumptively protected materials are obscene is a legal one. *United States v. Kimbrough*, 69 F.3d 723, 727 (CA5 1995). This Court held only items actually reviewed by the judge can be subjected to a seizure warrant, on the basis that, if the judge has not reviewed the items the judge has not made a determination of probable cause. *Lo-Ji Sales*, 442 U.S. at 326-27; and *Marcus*, 367 U.S. at 732. The Fifth Circuit, in this case, the Central District of California and the Eastern District of Texas'

decisions, conflict with this established law. These courts have not, in their opinions, taken into account whether the judge reviewed the allegedly obscene material in reaching their decisions and therefore are not aware of the importance of this requirement. *See, Wallace v. Wellborn*, 204 F.3d 165 (CA5 2000); *D.P.D. Inv. v. City of Beaumont*, 82 F. Supp. 2d 619 (E.D. Tex. 2000); *United States v. Echols*, 577 F.2d 308 (CA5 1978); and *Cinema Classics, Ltd. v. Busch*, 339 F. Supp. 43 (C.D. Cal. 1972). The Fourth and Eighth Circuits' decisions also conflict with this established case law. They have found when a judge reviews only a limited number of the materials allegedly believed to be obscene the review is sufficient to find probable cause that other items, not reviewed by the judge, are obscene and that those other items can be subjected to the seizure warrant. *B.A.P., Inc. v. McCulloch*, 994 F.Supp. 1131, 1146 (E.D. Mo. 1998), *aff'd*, 170 F.3d 804 (CA8 1999); and *Hicks v. Taylor*, 153 F.3d 720 (CA4 1998) (unpublished).

The second requirement, the warrant must state "with particularity" the material to be seized, also ensures against the prior restraint of nonobscene material. *Lo-Ji Sales*, 442 U.S. at 325; and *Marcus*, 367 U.S. at 732. This Court has found the warrant "particularly" describes the materials to be seized when the materials are listed, by name. *Lo-Ji Sales*, 442 U.S. at 325. But are not "particularly" described when the warrant restates the statute on obscenity because it does not "focus searchingly on the question of obscenity". *Marcus*, 367 U.S. at 732. The decisions of the Fifth Circuit, in this case, the Eighth Circuit and the Eastern District of Texas conflict with this established case law. These courts find

when a warrant recites the statutory definition of obscenity the particularity requirement is met on the basis that the officers are given direction as to what constitutes obscenity. *Wallace*, 204 F.3d at 166; *D.P.D. Inv.*, 82 F. Supp. 2d at 625; and *B.A.P., Inc.*, 170 F.3d at 1143. And the Central District of California failed to recognize this established case law, stating it is a "gray area and there is no authority on the issue". *Cinema Classics, Ltd.*, 339 F. Supp. at 48. The District of Maryland did follow the established law and found the warrant must state, by name, the magazine, video, novel, etc., to be seized on the basis that only a judge can make the determination that probable cause exists and only those items reviewed by a judge can be subject to a seizure warrant, merely reciting a statutory definition is not "particular". *Chesapeake B&M, Inc. v. Cassilly*, 729 F. Supp. 1106, 1107, 1112 (D.Md. 1990).

The third requirement, that if the seizure is for the purpose: to remove from circulation or to destroy the material, an adversarial pre-seizure hearing must be held, thus ensuring against prior restraint of nonobscene material. *Fort Wayne Books*, 489 U.S. at 63. This Court has found when all available copies are seized the material is removed from circulation and a pre-seizure adversarial hearing is required. *A Quantity Copies Books v. Kansas*, 378 U.S. 205, 210 (1964). The Fifth Circuit, in this case, the Fourth Circuit and the Texas Court of Appeals-First District decisions conflict with this Court because they find the purpose to be for the use in a criminal proceeding, which, according to *Heller*, 413 U.S. at 492, only requires the adversarial hearing be made available after the seizure upon the request of any interested party even when all available copies were seized. *Wallace*, 204 F.3d at

166-67; *Hicks*, 153 F.3d at 720; and *Video News, Inc. v. Texas* 790 S.W.2d 340, 342, 346 (Tex. App.-Houston [1st Dist.] 1990). The Central District of California and the Western District of Oklahoma did follow the established law and found that taking all available copies, takes the material out of circulation and is prior restraint requiring a pre-seizure hearing, regardless of what the warrant indicates the purpose to be. *Video Software Dealers Ass'n v. City of Oklahoma City*, 6 F. Supp. 2d 1292, 1295-96 (W.D. Okla. 1997); and *Cinema Classics, Ltd.*, 339 F. Supp. at 46, 48. This Court's guidance is needed to clarify for these courts that when the seizure is of all available copies the seizure removes the materials from circulation and requires a pre-seizure hearing.

This Court needs to evaluate this case and reiterate the established law for the lower courts that: a judge can only issue a seizure warrant for the items actually reviewed by the judge, a warrant must state the items by name to be seized and seizing all available copies of a material is per se unconstitutional without a pre-seizure hearing, to ensure individuals' First and Fourth Amendment rights are not violated.

B. The Decision of the Court of Appeals is Erroneous

The Court of Appeals erred in holding that the trial court properly determined a pre-seizure hearing was not required because it was not clearly established that a pre-seizure hearing was required when the purpose of the seizure was for criminal prosecution. Specifically, the trial

court and appeals court failed to follow the well-established law that when all available copies of the videotapes, magazines, eight-millimeter movie reels, birthday cards and toys or devices believed to be obscene were taken, the purpose of the seizure was to remove the material from circulation, not for criminal prosecution, and a pre-seizure hearing was required. And the law, being well-established and violating petitioner's First and Fourth Amendment rights, makes the officers liable and not entitled to qualified immunity. This erroneous determination not only resulted in petitioner's First and Fourth Amendment rights being violated, but assures that other similarly situated individuals will have their First and Fourth Amendment rights violated.

The trial court and court of appeals also failed to consider well-established law and find that since Judge Wellborn did not review any of the material presumed to be obscene, before signing the warrant, that this procedure did not "focus searchingly on the question of obscenity" and made the mass seizure unconstitutional under the First and Fourth Amendment. Thus the officers' actions of executing a mass seizure warrant, which they prepared and did know, or should have known, violated petitioner's First and Fourth Amendment rights, made them liable and not entitled to qualified immunity.

The trial court and court of appeals also failed to consider well-established law and find that since the warrant did not list each item to be seized, but referenced the statute that gives the definition of obscenity, this procedure did not "focus searchingly on the question of obscenity" and made the seizure unconstitutional under the First and Fourth Amendment. Since the officers'

actions of executing a warrant, which did not particularly list each item to be seized, they knew, or should have known, violated petitioner's First and Fourth Amendment rights, they are liable and not entitled to qualified immunity.

C. The Question Presented is Important

Material presumptively protected by the First Amendment is being subject to prior restraint because courts are not "focusing searchingly on the question of obscenity" before seizing items and subjecting non-obscene material to prior restraint by: (1) not making probable cause determinations as to what is obscene; (2) not stating with particularity the materials to be seized and allowing police officers to make the determination of what items constitute obscenity; and (3) not finding the purpose of the seizure is to remove from circulation when all available copies of the material are taken and thereby not requiring a pre-seizure hearing and subjecting non-obscene material to prior restraints.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

GREG GLADDEN
Counsel of Record
3017 Houston Avenue
Houston, Texas 77009
Phone: 713-880-0333
Fax: 713-880-4018
E-Mail: ggladden@neosoft.com

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-40160

JOE WALLACE, doing business as Video Liquidators

Plaintiff-Appellant

VERSUS

MICHAEL E. WELLBORN, ET AL.,

Defendants

LISA SHEPPARD, Department of Public Safety Agent, DANNY CONTRERAS, Department of Public Safety Agent,

Defendants-Appellees

Appeals from the United States District Court
for the Southern District of Texas
(Filed Feb. 8, 2000)

Before KING, Chief Judge, and DUHÉ and DeMOSS, Circuit Judges. DUHÉ, Circuit Judge:

Joe Wallace ("Wallace"), doing business as Video Liquidators, appeals the district court's order granting summary judgment based on qualified immunity to Department of Public Safety ("DPS") Agents Lisa Sheppard ("Sheppard") and Danny Contreras ("'Contreras"). We affirm.

I. BACKGROUND

Based on public complaints, Sheppard and Contreras began a criminal investigation of four adult video stores in Portland, Texas. Contreras purchased several allegedly obscene videos from Wallace's store. Sheppard reviewed these videos and concluded that they met the statutory definition of obscenity.

Thereafter, Sheppard, with the assistance of her supervisor, drafted and presented affidavits for search and seizure warrants of the four video stores to the Patricio County Court. She also drafted the search and seizure warrants. The judge reviewed and signed a warrant authorizing the agents to search all four stores. The warrant also authorized the agents to seize all material found to be in violation of Texas Penal Code § 43.21 *et seq.*, which outlaws the promotion of obscenity, and Texas Business and Commerce Code § 35.94(a), which outlaws the sale of videotapes that do not clearly display the name of the manufacturer on the package cover.

The DPS and other law enforcement agencies served the warrants on the four stores. Sheppard and Contreras searched Video Liquidators and seized 2,134 videotapes, 42 magazines, 75 eight-millimeter movie reels, two birthday cards, and 17 toys as evidence. The agents seized multiple copies of the same videos, and they confined the search to the back of the store where the sexually-orientated material was displayed. They also arrested Wallace for violating Texas Penal Code § 43.21. Before the seizure, no judicial hearing to review the videos' content was convened. The government tried Wallace twice for violating Texas obscenity law. A jury did not reach a verdict in

Wallace's first trial, and, in a second trial, a jury acquitted him. After the verdict the government returned the remainder of Wallace's property.

Wallace sued under 42 U.S.C. § 1983 for damages against Contreras and Sheppard. Wallace contends the agents unlawfully seized the videos from his store without a prior adversarial judicial proceeding. The agents successfully moved for summary judgment based on qualified immunity. The district court denied Wallace's motion for summary judgment.

II. DISCUSSION

We review a summary judgment de novo. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1096 (5th Cir. 1996). To establish that the agents are not entitled to summary judgment based on qualified immunity, Wallace must satisfy a three-part test. First, the plaintiff must allege the deprivation of a constitutional right. Second, we must determine whether this right was clearly established at the time of the alleged violation. Finally, we must determine whether the record at least gives rise to a genuine issue of material fact as to whether the defendants actually engaged in the conduct that violated this clearly established right. *Kipps v. Caillier*, 197 F.3d 765, 768 (5th Cir. 1999) (internal citations omitted).

The general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized based on probable cause. *Fort Wayne Books., Inc. v. Indiana*, 489 U.S. 46, 62-63 (1989). However when First Amendment rights are implicated, courts must apply "rigorous procedural safeguards

. . . before expressive materials can be seized as 'obscene.'" *Id.* (citing *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961)). Therefore, procedural safeguards, including a prior judicial adversarial proceeding, are usually required in a civil context. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964).

The Supreme Court has held that there is no absolute right to a prior adversarial hearing in cases where allegedly obscene material is seized to preserve evidence in a criminal prosecution. *Heller v. New York*, 413 U.S. 483, 488 (1973); *United States v. Echols*, 577 F.2d 308, 310 (5th Cir. 1978). After the seizure, a defendant may request a prompt judicial determination of the obscenity issue if the seizure was completed without a prior judicial hearing. *Heller*, 413 U.S. at 492 n.8.

Based on *Heller*, the district court concluded that the record demonstrated that the agents obtained and executed the warrant for the sole purpose of obtaining and preserving evidence for Wallace's criminal prosecution. The district court held that Wallace had no clearly established constitutional right to a prior adversarial hearing, and the agents were entitled to qualified immunity.

Wallace argues that this case is different than *Heller* because that case involved the seizure of one film rather than the seizure of more than 2000 videotapes, many of them duplicative. Even though this case is distinguishable from *Heller* on the facts, Wallace still does not enjoy a clear constitutional right to a prior judicial hearing. First, neither *Heller* nor *Fort Wayne Books* states affirmatively that seizing multiple copies of an item without a prior judicial proceeding is unconstitutional. *Heller*, 413 U.S. at

492 n.8 (questioning the need to seize multiple copies of a film as purely cumulative evidence); *Fort Wayne Books*, 489 U.S. at 63, *quoting Heller*, 413 U.S. at 492 ("While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversarial hearing."). Second, Contreras stated in an affidavit that it was necessary to seize the large quantity of evidence because each item was under Texas law illegal contraband. *See also Hicks v. Cassilly*, 97-2206, 97-2219, 1998 WL 433299 (4th Cir. July 27, 1998) (unpublished opinion) (holding that an officer was entitled to qualified immunity where more than 1,000 items were seized from an adult bookstore to preserve evidence in a criminal case without a prior adversarial hearing).

Therefore, Appellant has not shown a clearly established right to a pre-seizure hearing.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

JOE WALLACE, Plaintiff	§	
v.	§	CIVIL ACTION NO. C-97-623
MICHAEL E. WELLBORN, ET AL., Defendants.	§	

DEFENDANTS SHEPPARD'S AND CONTRERAS' RESPONSE TO WALLACE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Lisa Sheppard and Daniel Contreras, by and through their attorney, the Office of the Attorney General, file this, their response to Wallace's Motion for Partial summary Judgment, and would respectfully show this court as follows:

I.

Plaintiff Wallace moves this court to find Officers Sheppard and Contreras liable for damages as a matter of law.[1] Defendants have filed a Motion for Summary Judgment

---

[1] Wallace moves for "partial" summary judgment. However, a thorough read of the pleading as a whole, as well as the prayer, provides little clue as to which "part" of the case Wallace seeks to have summarily determined. Even further, it is difficult to discern which portion of the pleading is intended as a response to defendants' motion for summary judgment, and which is proffered to prove Wallace's own motion for summary judgment.

with responsive argument and summary judgment evidence applicable to each point raised by Wallace in his Motion for Partial Summary Judgment. In the interest of economy and efficiency, defendants incorporate by reference their Motion for Summary Judgment, based on the doctrine of qualified immunity, and contend that any significant response here would be duplicative and would add nothing to the court's ability to rule on the case. Defendants would add only that Wallace's motion focuses on one particular issue: the lack of an adversarial hearing in Judge Welborn's court prior to the December 13 search warrant being signed. The defendant officers contend, for the reasons already expressed in their Motion for Summary Judgment, that any actions taken by them to secure a hearing and warrant in Judge Welborn's court were certainly reasonable, and thus protected by qualified immunity. The record, however, shows that Judge Welborn was, and may still be, a defendant in this lawsuit. It is difficult to understand the focus Wallace places on the lack of an adversarial hearing in his claims against Sheppard and Contreras, as any decision to sign a search warrant, and pursue an adversarial hearing as a prerequisite, would certainly be the responsibility of the presiding judge. Sheppard and Contreras' actions in this case were confined to investigation of possible criminal activity, subsequent presentation of a search warrant to the judge for signature, and the subsequent search and arrests. There would have been no search or arrests had the search warrant not been signed by the presiding judge.

As for the "objective legal reasonableness" of the defendant officers' conclusion that the seized materials were probably obscene, their opinion was obviously

shared by Judge Welborn. The standard for qualified immunity is whether officials "of reasonable competence could disagree on this issue" If they could, then "immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986). Even more telling, if two state judges cannot agree on whether this seizure was legal, qualified immunity would certainly attach to Sheppard and Contreras' decision to pursue the seizure. (See Wallace's Motion for Summary Judgment, p. 9. Judge Yeager's decision) Defendants pray that Wallace's Motion for Partial Summary Judgment be denied.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DAVID A. TALBOT, JR.
Deputy Attorney General for Litigation

TONI HUNTER, Chief
General Litigtion Division

/s/ J. Bradley Spalding
J. BRADLEY SPALDING
Assistant Attorney General
Attorney-in-Charge
Texas Bar No. 00786253
P. O. Box 12548, Capitol Station
Austin, Texas 78711
Phone No. (512) 463-2120
Fax No. (512) 320-0667

ATTORNEYS FOR DEFENDANTS
SHEPPARD AND CONTRERAS

CERTIFICATE OF SERVICE

I, J. Bradley Spalding, Assistant Attorney General, hereby certify that a true and correct copy of the foregoing document has been sent via first class mail, return receipt requested, on **May 22, 1998** to:

Greg Gladden
Attorney at Law
3017 Houston Avenue
Houston, Texas 77009

James McKibben
HUNT, HERMANSEN, McKIBBEN
& VILLAREAL, L.L.P
1100 Tower II
555 North Caranchahua
Corpus Christi, Texas 78478

/s/ J. Bradley Spalding
J. BRADLEY SPALDING
Assistant Attorney General

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOE WALLACE, d/b/a VIDEO LIQUIDATORS,	§	CIVIL ACTION NO. C 97-623
Plaintiff	§	JUDGE HAYDEN W. HEAD. JR.
VS.	§	
MICHAEL E. WELBORN, ET AL.	§	

PLAINTIFF'S REPLY TO DPS DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JOE WALLACE, d/b/a VIDEO LIQUIDATORS. Plaintiff in the above styled cause by and through GREG GLADDEN, and respectfully submits this his reply to the DPS Defendants' Response to Plaintiff's Motion for Summary Judgment. Plaintiff replies as follows:

I.

[1] Plaintiff, for the purpose of being clear to our Attorney General, is moving for summary judgment on the basis of liability. The Defendants herein violated a clearly established constitutional right and they do not deny this. Their only defense to violating Plaintiff's right to free speech is that they never heard of an adversarial hearing to determine the issue of obscenity prior to the issuance

and execution of a mass search and seizure warrant. They further assert that it is certainly and objectively reasonable to ignore the United States Supreme Court's mandates set out in *Boyd v. United States*, 116 U.S. 616, 626. 6 S.Ct. 524, 530, 29 L.Ed. 746. *Marcus v. Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708 (1961). *A Quantity of Copies of Books, et al. v. The State of Kansas*, 378 U.S. 205, 84 S.Ct. 1723 (1964), *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed. 2d 745 (1973), *Bantam Books v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963), *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), *Smith v. The State of California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), and Fifth Circuit precedent of *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir. 1978), *affirmed*, 445 U.S. 308, 100 S.Ct. 1156. 63 L.Ed. 2d 413 (1979).

The DPS Defendants assert that it is difficult to understand the focus Plaintiff places on the lack of an adversarial hearing. Plaintiff attaches and incorporates by reference as if fully set out herein a copy of *Marcus v. Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708 (1961), and argues that this is a case about the suppression of what the government has labeled undesirable speech. A prior adversarial hearing to determine the issue of obscenity is designed to strike the balance between free speech and obscenity. Otherwise people may be afraid to speak and that would destroy the legitimacy of this country. The lines between speech unconditionally guaranteed and speech, which legitimately may be regulated, suppressed, or punished, is finely drawn, and calls for sensitive tools. *A Quantity of Books*, supra. 378 U.S. at 212, 84 S.Ct. at 1726-27, citing *Marcus*, 367 U.S. at 730-731. 81 S.Ct. at

1715-16. However, these DPS defendants never heard of such a procedure and probably do not care, because they want to suppress speech that may offend them personally. It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. *A Quantity of Books*, supra, 378 U.S. at 211-212, 84 S.Ct. 1726.

[2] The evidence that supports a denial of the DPS Defendants' Motion for Summary Judgment also supports Plaintiff's Motion for Summary Judgment.

[3] The DPS Defendants contend that they can hide behind Judge Welborn's issuance of the mass search and arrest warrant. Once again, Plaintiff attaches as an exhibit, adopts and incorporates as if fully set out herein *Malley v. Briggs*, 475 U.S 335, 339-45, 106 S.Ct. 1092, 1095-98, 89 L.Ed. 2d 271 (1986).

The United States Supreme Court held that officers who cause a warrant to be issue do not enjoy absolute immunity *Malley v. Briggs*, 475 U.S. 335, 339-45, 106-S.Ct. 1092, 1095-98, 89 L.Ed. 2d 271 (1986).

In deciding whether the officers were entitled to qualified immunity, the Court asked

> whether a reasonably well-trained officer in petitioner's [the officer's] position would have known that his affidavit failed to establish probable pause and that he should not have applied

> for the warrant.[2] If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

Id., 475 U.S. at 345-6; 106 S.Ct. at 1098. In the Court's opinion at footnote 9, the Court clarified its decision by saying that this rule in no way requires the police officer to assume a role even more skilled than the magistrate, and that if the magistrate acts mistakenly but within the range of professional competence, the requesting officer will not be held liable. The rule is designed to expose to damages liability situations where

> no officer of reasonable competence would have requested the warrant, i.e., his request is outside the range of professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating

---

[2] The Court, in footnote 8, stated that the question of whether the officer's conduct in that case was in fact objectively reasonable was not before the Court. That issue was to be decided on remand. *Malley v. Briggs*, 475 U.S. at 345, 106 S.Ct. at 1098.

> gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.

Id. No reasonably trained officer, with knowledge of the mandates of Marcus v. Search Warrants and A Quantity of Books would have applied for the warrant in question without a prior adversarial hearing to determine the issue of obscenity.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Court hold a hearing on this Motion for Partial Summary Judgment, then find that no dispute of material fact exists, and that Plaintiff is entitled to Judgment as a Matter of Law on the issue of liability, and set this cause for trial before a jury on the issue of damages.

Respectfully submitted,
/s/ Greg Gladden

GREG GLADDEN
3017 Houston Avenue
Houston, Texas 77009
PH: (713) 880-0333
FAX: (713) 880-4018
State Bar No. 07991300

MICHAEL S. PANESAR
405 Main Street, Suite 450
Houston, Texas 77002
PH: (713) 228-4611
FAX: (713) 236-8663
TBA # 00797197
S.D. #20493

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Reply to the DPS Defendants' Response to Plaintiff's Motion for Summary Judgment and Notice of Hearing served by certified mail, return receipt requested, or hand delivered to:

JAMES McKIBBEN
HUNT, HERMANSEN, McKIBBEN & VILLAREAL, L.L.P.
1100 TOWER II
55 NORTH CARANCAHUA
CORPUS CHRISTI, TEXAS 78478

J. BRADLEY SPALDING
ASSISTANT ATTORNEY GENERAL
GENERAL LITIGATION DIVISION
PO BOX 12548
AUSTIN, TEXAS 78711-2548

on this the 11th day of June, 1998.

/s/ Greg Gladden
GREG GLADDEN

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOE WALLACE D/B/A VIDEO LIQUIDATORS	§	
v.	§	CA. NO. C-97-623
MICHAEL E. WELLBORN, ET AL.	§	

ORDER GRANTING DEFENDANTS CONTRERAS AND SHEPPARDS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Sept. 18, 1998)

This is a suit brought under 42 U.S.C. § 1983 for damages against two Texas Department of Public Safety-Criminal Intelligence Service agents. Sgt. Danny Contreras and Sgt. Lisa Sheppard. Plaintiff complains defendants unlawfully seized videos he sold from his place of business. Video Liquidators in Portland Texas. Defendants respond that they seized the videos pursuant to a warrant based on probable cause for use as evidence against the plaintiff in a criminal obscenity prosecution under Texas Penal Code Section 43.21. Defendants Sheppard and Contreras jointly filed a motion for summary judgment based on qualified immunity (DE 26). Plaintiff filed a response and motion for partial summary judgment (DE 28).

Under Federal Rule of Civil Procedure 56, if the pleadings, depositions, answers to interrogatories, and admissions on file, along with the affidavits, if any, show there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. Further, the plain language of Rule 56(e) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. V. Catrett,* 106 S.Ct. 2548, 2252 (1986).

To ascertain whether summary judgment is proper in this cause, the Court reviewed the entire record and held a hearing on the motion. After due consideration, the court holds that defendants Sheppard and Contreras are entitled to qualified immunity and summary judgment should be granted in their favor. Plaintiff's motion for partial summary judgment should be denied.

In connection with a criminal investigation inspired by public complaints, Sgt. Contreras purchased several allegedly obscene videos from plaintiff. Sgt. Sheppard reviewed the videos and, based on her DPS training and experience in similar investigations, concluded the videos met the statutory definition of obscenity. With the concurrence of her supervisors, Sgt. Sheppard drafted, and, with the assistance of an assistant county attorney, presented affidavits for a search and seizure warrant to the Honorable Michael Welborn, San Patricio County Judge. Judge Welborn reviewed and signed a warrant authorizing DPS agents to search Video Liquidators for "obscene material and seize the same and to. . . . take custody of all seized

property and safekeep such property as provided by statute."

On December 13, 1995, DPS officers entered Video Liquidators to serve the warrant. The officers seized 2134 video tapes. 42 magazines, 75 eight-millimeter movie reels, two birthday cards, and 17 toys or devices as evidence in plaintiff's criminal prosecution. Plaintiff was arrested and criminal complaints filed.[1]

Prior to seizure, no civil judicial hearing to review the videos' content was convened. Instead, the issue of obscenity was contested in two separate criminal trials. One video was presented to the jury in each trial. The first criminal trial, resulting in a hung jury, took place in San Patricio County Court on April 24, 1997. Plaintiff's second trial, held on October 23, 1997, resulted in an acquittal. On April 18, 1998, plaintiff's property was returned to him.[2]

Officers Sheppard and Contreras have asserted the defense of qualified immunity. Qualified immunity shields government officials performing discretionary functions from personal civil liability " . . . insofar as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person should have

---

[1] Contemporaneous with the seizure at Video Liquidators, the DPS conduced three other operations at similar establishments. The owners of those businesses have not filed lawsuits. The Court is advised two of the owners pleaded guilty to criminal obscenity charges, while the other agreed to pre-trial diversion. These cases are not before the Court.

[2] An inconsequential number of the seized videos were returned on March 11, 1996.

known." *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). The two-step analysis for determining the existence for qualified immunity requires the Court to ascertain whether a clearly established right has been violated and whether a reasonable official would understand that his actions violate that right. *Mitchell v. Forsythe*, 105 S.Ct. 2806, 2815-16 (1985).

While the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence may be seized on a warrant issued with probable cause, the First Amendment provides additional protection to some expressive materials. *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. 916, 927 (1989). Obscene material enjoys no First Amendment protection, but "rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene.' " *Marcus v. Search Warrant*, 81 S.Ct. 1708, 1716 (1961). In a civil context, such procedural safeguards should probably include a prior judicial adversarial hearing. *A Quantity of Copies of Books v. Kansas*, 82 S.Ct. 1723 (1964).

Plaintiff alleges defendants Contreras and Sheppard violated his clearly established constitutional rights by seizing his property without such a prior adversarial hearing. Contrary to plaintiff's claim that, on December 16, 1995, constitutional law clearly required an adversarial hearing be held prior to seizure of the videos, no prior adversarial hearing was required when material is seized as evidence pursuant to a criminal prosecution. *Heller v. New York*, 93 S.Ct. 2789, 2793 (1973); *United States v. Echols*, 577 F.2d 308, 310 (5th Cir. 1995); *Hicks v. Cassilly*,

1998 WL 433299 (4th Cir. 1998).[3] The record amply demonstrates defendants Sheppard and Contreras obtained and executed the warrant for the sole purpose of obtaining and preserving evidence for criminal prosecution of the plaintiff.

Because plaintiff had no clearly established constitutional right to a prior adversarial hearing, defendants Sheppard and Contreras are entitled to qualified immunity without regard to their actions' objective legal reasonableness. Accordingly, defendants Sheppard and Contreras' motion for summary judgment is granted and plaintiff's motion for partial summary judgment is denied.

ORDERED this 16 day of Sept., 1998.

/s/ H. W. Head, Jr.
H. W. HEAD, JR.
UNITED STATES
DISTRICT JUDGE

---

[3] *Hicks v. Cassilly* is an unpublished opinion, but because it reverses the district court decision offered by plaintiff as authoritative, this Court feels the appropriate authority should be cited.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40160

JOE WALLACE, doing business as Video Liquidators

Plaintiff-Appellant

v.

MICHAEL E WELLBORN, ET AL.

Defendants

LISA SHEPPARD, Department Public Safety Agent;
DANNY CONTRERAS, Department Public Safety Agent

Defendants-Appellees

Appeals from the United States District Court for the Southern District of Texas, Corpus Christi

---

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 2/8/00, 5 Cir., ___, ___ F.3d ___)

(Filed Mar. 23, 2000)

Before KING, Chief Judge, and DUHÉ and DeMOSS, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the

court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Deekie Jr.
United States Circuit Judge

APPENDIX F

SEARCH AND ARREST WARRANT

THE STATE OF TEXAS)

THE COUNTY OF SAN PATRICIO)

THE STATE OF TEXAS TO THE SHERIFF OR ANY PEACE OFFICER OF SAN PATRICIO COUNTY, TEXAS OR ANY PEACE OFFICER OF THE STATE OF TEXAS, GREETINGS:

Whereas, the Affiant whose name appears on the attached Affidavit is a Peace Officer under the laws of Texas and did heretofore this day subscribe and swear to said Affidavit before me, (which said Affidavit is here now made part hereof for all purposes), and whereas I find that the verified facts stated by Affiant in said Affidavit show that Affiant has probable cause for the belief expressed therein and establish existence of proper grounds for issuance of this Warrant; now, therefore, you are commanded to enter the suspected place described in said Affidavit and to there search for the described obscene material and video recording tapes which violate the Texas Penal Code Chapter 43 subchapter (B) and Vernon's Texas Codes Annotated Business and Commercial Code, Section 35.94 (a) and business records related to the commercial promotion of obscene material described in said Affidavit and to seize the same and bring it before me and to arrest and bring before me each suspected party named in said Affidavit. The court recognizes that some of the above described property is data that may be contained in computers and on cassette

tapes, video tapes, and in electronic and machine readable media which is not readable in this state by the officers executing this warrant. Authorization is granted to seize, listen to, read, review, and to maintain the above described property and to convert it to human readable form, as necessary.

Further, you are ORDERED, pursuant to the provisions of Article 18.10, Texas Code of Criminal Procedure, to retain custody of any property seized pursuant to this Warrant, until further order of this Court or any other court of appropriate jurisdiction shall otherwise direct the manner of safekeeping of said property. This Court grants you leave and authority to remove such seized property from this county, if and only if such removal is necessary for the safekeeping of such seized property by you, or if such removal is otherwise authorized by the provisions of Article 18.10, T.C.C.P. You are further ORDERED to give notice to this Court, as a part of the inventory to be filled subsequently to the execution of this Warrant, and as required by Article 18.10, T.C.C.P., of the place where the property seized hereunder is kept, stored and held.

Herein fail not, but have you then and there this Warrant within three days, exclusive of the day of its issuance and exclusive of the day of its execution, with your return thereon, showing how you have executed the same. ISSUED THIS THE 12th day of December, 1995 at 1:00 o'clock P.M. TO CERTIFY WHICH WITNESS MY HAND THIS DAY.

/s/ Michael E. Welborn
San Patricio County Court
Judge
San Patricio County, Texas

APPENDIX G

AFFIDAVIT FOR SEARCH AND SEIZURE WARRANT

THE STATE OF TEXAS
THE COUNTY OF SAN PATRICIO

THE UNDERSIGNED AFFIANT, BEING A PEACE OFFICER UNDER THE LAWS OF TEXAS AND BEING DULY SWORN, ON OATH MAKES THE FOLLOWING STATEMENTS AND ACCUSATIONS:

I. THERE IS IN SAN PATRICIO COUNTY, TEXAS, A SUSPECTED PLACE DESCRIBED AND LOCATED AS FOLLOWS:

A certain place and premises located as follows, to wit: a two story white stucco building with a brown composition shingle awning over the front door which faces west. The building is further identified by a wood paneling on the sides of the front door and the words "VIDEO BUY SELL" and "LIQUIDATORS TRADE" affixed to the wood paneling on white and black signs with red lettering. The northside of the structure displays the words "VIDEO LIQUIDATORS" in red letters above a single window. The structure is occupied as a business and is located at 504 Moore Avenue at the intersection of Fifth Street in Portland, Texas, San Patricio County. This is to include the surrounding curtilage and any and all vehicles which are owned or under control of the suspected parties. Said location is shown in the photograph that is attached hereto and incorporated herein for all purposes.

[Picture Omitted In Printing]

2. SAID SUSPECTED PLACE IS IN CHARGE OF AND CONTROLLED BY EACH OF THE FOLLOWING PARTIES (HEREAFTER CALLED "SUSPECTED PARTY", WHETHER ONE OR MORE), TO WIT:

An employee of the business VIDEO LIQUIDATORS, identified as JOE E. WALLACE, a Caucasian male, DOB 08-10-42 approx. 5' 9", weighing about 240, with gray and brown hair, mustache and beard. An unidentified Caucasian male employee of the business VIDEO LIQUIDATORS approximately 5' 8" tall and weighing about 160 pounds with gray hair and mustache, approximately 60 to 65 years of age.

3. IT IS THE BELIEF OF AFFIANT, AND AFFIANT HEREBY CHARGES AND ACCUSES, THAT SAID SUSPECTED PARTY HAS POSSESSION OF AND IS PROMOTING AND SELLING AT SAID SUSPECTED PLACE IN VIOLATION OF THE LAWS OF TEXAS, THE FOLLOWING OBSCENE MATERIAL TO WIT:

Any and all magazines, brochures, video tapes, CD Roms or books depicting or describing ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality or patently offensive representations or descriptions of masturbation, excretory functions, sadism, masconism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, or covered male genitals in a discernible turgid state in violation of the Texas Penal Code Chapter 43 Subchapter (B).

Any and all video recording tapes which violated Vernon's Texas Codes Annotated, Business and Commerce

Code, Section 35.94 (a), i.e., the outside cover, box or jacket of the recording does not clearly and conspicuously disclose the actual name and address of the manufacturer and the name of the performer or group.

Any and all business records related to the commercial promotion of obscene material including but not limited to invoices, sale receipts, packing materials, employees records, time sheets, order forms, catalogs, computer print-outs, and computerized data, payroll records, correspondence, memos, financial and bank records, and any other written or recorded business records or documents.

4. AFFIANT HAS PROBABLE CAUSE FOR SAID BELIEF BY REASON OF THE FOLLOWING FACTS, TO WIT:

Your Affiant, Lisa Sheppard, a Sgt. Investigator for the Texas Department of Public Safety, Criminal Intelligence Service, has been commissioned as a peace officer in the State of Texas for more than twelve years and while employed by the Texas Deportment of Public Safety, has conducted investigations involving obscene material.

On 10-20-95 at approx. 3:30PM., DPS CIS Sgt. Danny Contreras entered the suspected place and recognized JOE WALLACE from a newspaper photograph published on October 21, 1995 in the Corpus Christi Caller Times. WALLACE was the employee on duty. Once inside the business, Sgt. Contreras entered a separate room through an unlocked closed door near the rear of the business. Sgt. Contreras entered the room and observed numerous (more than six) video cassette tapes and magazines which had covers that were clearly displayed on the walls,

shelves and display stands of VIDEO LIQUIDATORS. Many of the covers depicted sodomy, masturbation, lewd exhibition of the genitals, cunnilingus, fellatio and the male and female genitals in a state of sexual stimulation and arousal. Sgt. Contreras purchased a magazine titled "SUCKIN' BUDDIES". The front cover of "SUCKIN' BUDDIES" clearly depicts three nude males (except for tennis shoes). One male, who is manually masturbating his own penis, is performing oral copulation on another male simultaneously. A third male is seemingly masturbating as he watches the first two males. The magazine "SUCKIN' BUDDIES" contains clear photographic representations of masturbation, ejaculation and males performing oral copulation on each other.

Sgt. Contreras also purchased VHS video cassette tape titled, "AMATEUR ORGIES, SERIES FIVE". This tape topics various sex acts and deviate sex acts centering around multiple partners. Acts of vaginal intercourse, oral copulation, digital penetration of the vagina, sodomy, and combinations of the above are clearly and graphically depicted throughout the video.

A third VHS video cassette tape was purchased by Sgt. Contreras on 10-30-95, titled "SODO-MANIA III WITH FOREIGN OBJECTS". This tape depicts graphic representations of sodomy, masturbation, excretory functions, oral copulation, vaginal and anal insertion of devices, vaginal intercourse, anal intercourse and combinations of the above.

Sgt. Contreras purchased the above material from JOE WALLACE.

On 11-21-95 at approx. 2:10 PM, DPS CIS Sgt. Danny Contreras entered the suspected place and purchased a video cassette tape entitled "GANG BANG ALLEY". This tape clearly and graphically depicts numerous acts of oral copulation, manual masturbation, sodomy, ejaculation, and combinations of the abovementioned acts (male on male) throughout the video.

Sgt. Contreras also purchased, at the same time, a magazine entitled "CUMIN' TOGETHER". The front cover of "CUMIN' TOGETHER", which was clearly displayed in the adult section of the suspected place, clearly depicts three nude males (except for socks). One male, who is squatting over the face of another nude male, is performing oral copulation on a third male. "CUMIN' TOGETHER" contains approximately twelve depictions of a male performing oral copulation on another male. At least three more photographs show men whose mouth or tongue is clearly touching the penis of another male. Approximately twelve photographs clearly and graphically depict simulated or actual manual masturbation. One photograph depicts ejaculation in conjunction with manual masturbation. Photographic representations of simulated or actual anal intercourse, digital penetration of the anus, and contact between the tongue and/or mouth of a male with the anal area of another male are also shown. Several of the abovementioned sexual acts are being performed in the photographs by males wearing "love rings" around their penis and testicles.

Sgt. Contreras observed numerous (over six) magazines and video tapes whose covers were clearly displayed on the walls of VIDEO LIQUIDATORS. Many of the covers depicted sodomy, masturbation, lewd exhibition of the

genitals, cunnilingus, fellatio and the male and female genitals in a state of sexual stimulation and arousal.

On 11-21-93 Sgt. Contreras purchased the above material from an unidentified Caucasian male described as a "Suspected Party" herein.

On 12-11-95, Sgt. Contreras entered the premises of the suspected place and observed numerous (more than six) video cassette tapes and magazines which had covers that were clearly displayed on the walls and display racks of the suspected place. Many of the covers depicted sodomy, masturbation, lewd exhibition of the genitals, cunnilingus, fellatio and the male and female genitals in a state of sexual stimulation and arousal.

WHEREFORE, AFFIANT ASKS FOR ISSUANCE OF A WARRANT THAT WILL AUTHORIZE THE SEARCH SAID SUSPECTED PLACE FOR SAID OBSCENE MATERIAL AND SEIZE THE SAME AND TO ARREST EACH SAID SUSPECTED PARTY, AND TO TAKE CUSTODY OF ALL SEIZED PROPERTY AND SAFEKEEP SUCH PROPERTY AS PROVIDED BY STATUTE.

/s/ Lisa Sheppard
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME BY SAID AFFIANT ON THIS THE 12th DAY OF DECEMBER 1995, AT 1:00 P.M.

/s/ Michael E. Welborn
SAN PATRICIO COUNTY
COURT JUDGE
SAN PATRICIO COUNTY,
TEXAS

Supreme Court, U.S.
FILED
OCT 13 2000
CLERK

No. 99-~~102059~~ 2059

IN THE
SUPREME COURT OF THE UNITED STATES

JOE WALLACE, doing business as Video Liquidators,
Petitioner,

v.

MICHAEL E. WELLBORN, Judge, County Court of Law Judge; LISA SHEPPARD, Department of Public Safety Agent; DANNY CONTRERAS, Department of Public Safety Agent; SAN PATRICIO COUNTY; DAVID H. AKEN, JR., San Patricio County Attorney,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

JEFFREY S. BOYD
Deputy Attorney General

TONI HUNTER
Chief, General Litigation Division

DAVID S. MORALES
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
Counsel for Respondents

11 pp

QUESTION PRESENTED FOR REVIEW

Was it reversible error for the trial court to find that there is no absolute right to a prior adversary hearing where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES ii

SUPPLEMENTAL STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENTS FOR DENYING THE PETITION 3

I. Wallace Did Not Establish That in 1995, He Had A Clearly Established Right To A Prior Adversarial Hearing Where Allegedly Obscene Material Is Seized, Pursuant To A Warrant, For The Purpose Of Preserving The Material As Evidence In A Criminal Prosecution. 4

II. The Fifth Circuit Decision In This Case Is Not In Conflict With That Of Any Other Circuit. 6

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

B.A.P, Inc. v. McCulloch, 994 F.Supp. 1131 (E.D. Mo 1998), *aff'd* 170 F.3d 804 (8th Cir. 1999) 6

Chesapeake B&M Inc. v. Cassily, 729 F.Supp. 1106 (D. Md. 1990) 6

Heller v. New York, 413 U.S. 483 (1973) 3, 5, 6

Hicks v. Taylor, 153 F.3d 720 (4th Cir. 1998)(unpublished) .. 6

Lo-Ji Sales v. New York, 442 U.S. 319 (1979) 4, 5

United States v. Echols, 577 F2d 308 (5th Cir. 1978) 6

Statutes

42 U.S.C. §1983 3

Texas Penal Code Chapter 43.21 2

Texas Penal Code Chapter 43, subchapter (B) 2

Vernon's Texas Codes Annotated, Business and Commerce Code, Section 35.94(a) 1, 2

No. 99-102059

IN THE
SUPREME COURT OF THE UNITED STATES

JOE WALLACE, doing business as Video Liquidators,
Petitioner,

v.

MICHAEL E. WELLBORN, Judge, County Court of Law Judge; LISA SHEPPARD, Department of Public Safety Agent; DANNY CONTRERAS, Department of Public Safety Agent; SAN PATRICIO COUNTY; DAVID H. AKEN, JR., San Patricio County Attorney,
Respondents.

On Petition For Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL STATUTORY PROVISION INVOLVED

Vernon's Texas Codes Annotated, Business and Commerce Code, Section 35.94(a).

STATEMENT OF THE CASE

Based on public complaints, the Texas Department of Public Safety began a criminal investigation of four Portland, Texas adult video stores in October 1995. During October and November 1995, Respondent Danny Contreras, an undercover sergeant with the Texas Department of Public Safety (herein "DPS"), entered

one of the four stores, Video Liquidators, which was owned by Petitioner, Joe Wallace. After visually inspecting numerous videos and magazines whose covers depicted sodomy, masturbation, lewd exhibition of the genitals, cunnilingus, fellatio and male and female genitals in a state of sexual stimulation and arousal, Sgt. Contreras purchased several of these video cassette tapes and magazines from Wallace. (Appendix G, App.27-29.) These items were then stored at DPS headquarters in Corpus Christi, Texas.

Thereafter, Respondent Lisa Sheppard, the DPS sergeant/investigator in charge of the investigation, prepared and presented a detailed affidavit to San Patricio County Judge Michael Wellborn in support of search and seizure and search and arrest warrants to be executed at Video Liquidators.

On December 12, 1995, Judge Wellborn reviewed the affidavit, made a probable cause determination, and in signing the warrant, authorized law enforcement agents to seize, as evidence, all material and videotape recordings in violation of Texas Penal Code Chapter 43, subchapter (B), which outlaws the promotion of obscenity, and Vernon's Texas Codes Annotated Business and Commercial Code, Section 35.94(a), which outlaws the sale of videotapes that do not clearly display the manufacturer on the package cover.

On December 13, 1995, Sgt. Contreras, along with state and local law enforcement agents, executed the warrant at Video Liquidators and seized 2,134 videotapes, 42 magazines, 75 eight-millimeter movie reels, two birthday cards and 17 toys as evidence pursuant to the December 12, 1995, warrant. Likewise, Wallace was arrested for violating Texas Penal Code Chapter 43.21.

Following his arrest, Wallace exercised his right to a prompt judicial determination of the obscenity issue, demanding the return of the seized property. Wallace's two subsequent criminal trials

resulted in a mistrial and an acquittal respectively. Following his acquittal, each of the items which had been held as evidence in his criminal prosecution were returned to Wallace.

Wallace thereafter filed suit for damages against Sgts. Sheppard and Contreras, under 42 U.S.C. §1983. The trial court granted summary judgment on the basis of qualified immunity, finding that there is no absolute right to a prior adversary hearing where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. The United States Court of Appeals for the Fifth Circuit thereafter affirmed the trial court's decision, holding that Wallace had not shown a clearly-established right to a pre-seizure hearing.

ARGUMENTS FOR DENYING THE PETITION

In affirming the trial court below, the Fifth Circuit expressly tracked this Court's long-standing holding in *Heller v. New York*, 413 U.S. 483 (1973). However, despite the fact that *Heller* has held, for over 27 years, that there is no absolute right to a prior adversary hearing where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution, Wallace now seeks to convince this Court that *Heller* did in fact guarantee such a right. It does not. As demonstrated below, Wallace has not articulated a clearly established right under the facts of his case, but rather is attempting to have this Court overrule its holding in *Heller*. As such, the petition should be denied.

I. Wallace Did Not Establish That In 1995, He Had A Clearly Established Right To A Prior Adversarial Hearing Where Allegedly Obscene Material Is Seized, Pursuant To A Warrant, For The Purpose Of Preserving The Material As Evidence In A Criminal Prosecution.

When arguing about the state of the law concerning prior adversarial hearings, Wallace argues that lower courts (presumably including the trial court below) are "unwilling to make decisions because of the ambiguity." (Pet. at 5.) As such, Wallace himself has conceded that there is "ambiguity" concerning whether a clearly established right to a prior adversarial hearing exists when allegedly obscene material is seized, pursuant to a warrant, for the purpose of preserving the material as evidence in a criminal prosecution. On this basis alone, the Fifth Circuit was correct in affirming the summary judgment dismissal based on Qualified Immunity.

However, Wallace also argues that in *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979), this Court recognized such a clearly established right. A cursory review of the *Lo-Ji* opinion, however, dispels this argument. In *Lo-Ji*, a New York state police investigator purchased two videos from an "adult" bookstore, reviewed them, and determined that they were in violation of state obscenity laws. The investigator submitted an affidavit to the town justice who, relying on the affidavit, issued a warrant authorizing the search of the store and the seizure of other copies of the two tapes. *Lo-Ji*, 442 U.S. at 321.

This is where any similarity between the facts in the instant case sharply diverge from those in *Lo-Ji*. In issuing his warrant, the justice in *Lo-Ji* authorized the seizure of "[t]he following items which the Court independently [on examination] has determined to be possessed in violation" of state law. *Id.* However, at the time the warrant was issued, there were no items listed or described following this statement. *Id.* Instead, the justice

personally participated in the review and seizure of additional material at the bookstore and, *ex post facto,* added a list of the seized items to the warrant. *Id* at 321-324.

Based on the town justice's issuance of an open ended warrant to be completed while a search is being conducted, and the justice's personal participation in the execution of the warrant, this Court held that he "did not manifest the neutrality and detachment demanded of a judicial officer when presented with a warrant application for search and seizure." *Id.* at 326. Significantly, however, even considering the facts present in *Lo-Ji,* this Court did not specifically hold that a clearly established right to a prior adversarial hearing exists when allegedly obscene material is seized, pursuant to a warrant, for the purpose of preserving the material as evidence in a criminal prosecution.

Instead, the *Lo-Ji* Court cited *Heller's* long-standing rule that as long as a prompt adversarial hearing is available on the issue of obscenity, an adversary hearing prior to a seizure by lawful warrant would not materially increase First Amendment protection. *See Id.* at 328.

Wallace acknowledges that he was provided an adversarial hearing on the obscenity issue following the seizure in this case. His argument is, rather, that he had an absolute right to a pre-seizure hearing. This is exactly the same argument that was rejected by this Court twenty-seven years ago. *Heller*, 413 U.S. at 493. However, Wallace now argues to this Court that Sgts. Sheppard and Contreras should have known that this Court's true intention in 1973 was to establish just such a right. Wallace's argument is wholly without merit. As such, his Petition should be denied in its entirety.

II. The Fifth Circuit Decision In This Case Is Not In Conflict With That Of Any Other Circuit.

In his petition, Wallace does not identify any conflict among the circuits with respect to the facts and issues of this case. Instead, Wallace cites to a Younger Abstention case out of a Maryland district court. *Chesapeake B&M Inc. v. Cassily*, 729 F.Supp. 1106 (D. Md. 1990). However, *Cassily* does not address the merits of whether a clearly established right to a prior adversarial hearing exists when allegedly obscene material is seized, pursuant to a warrant, for the purpose of preserving the material as evidence in a criminal prosecution. As such, its holding does not indicate a conflict, much less a conflict among the circuits.

Instead, Wallace himself has shown that, along with the Fifth Circuit, the Eighth and Fourth Circuits have consistently upheld the rule set down in *Heller* and its progeny. *United States v. Echols*, 577 F2d 308 (5th Cir. 1978); *B.A.P, Inc. v. McCulloch*, 994 F.Supp. 1131, 1146 (E.D. Mo 1998), *aff'd* 170 F.3d 804 (8th Cir. 1999); *Hicks v. Taylor*, 153 F.3d 720 (4th Cir. 1998)(unpublished).

As such, Wallace has not shown that there is any conflict among the circuits regarding whether a right to a prior adversarial hearing exists when allegedly obscene material is seized, pursuant to a warrant, for the purpose of preserving the material as evidence in a criminal prosecution. Accordingly, this Petition should be denied in its entirety.

CONCLUSION

In view of all the foregoing, Respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

JEFFREY S. BOYD
Deputy Attorney General

TONI HUNTER
Chief, General Litigation Division

DAVID S. MORALES
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

Counsel for Respondents

Supreme Court, U.S.
FILED
OCT 23 2000
CLERK

(3)

No. 99-2059

In The

Supreme Court of the United States

JOE WALLACE, doing business as Video Liquidators,
Petitioner,

v.

MICHAEL E. WELLBORN, Judge, County Court at Law Judge; LISA SHEPPARD, Department Public Safety Agent; DANNY CONTRERAS, Department Public Safety Agent; SAN PATRICIO COUNTY; DAVID H. AKEN, JR., San Patricio County Attorney,
Respondents.

On Petition For Writ of Certiorari To The Court of Appeals For The Fifth Circuit

---

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREG GLADDEN
TBA NO. 07991300
3017 Houston Avenue
Houston, Texas 77009
Phone: 713/880-0333
Fax: 713/880-4018
Counsel of Record for Joe Wallace

7 pp

QUESTION PRESENTED

Whether the bald assertion of "evidence gathering for criminal prosecution" by police officers relieves the courts of their responsibility to enforce the well-settled law against mass seizures of presumptively protected speech material without inquiry into whether the facts support a claim that the mass seizure was to censor free speech.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW Petitioner Joe Wallace to file his Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari, on issues of:

Petitioner does not concede that the mass seizure was for the purpose of preserving the material as evidence in a criminal prosecution. The seizure was for the purpose of censorship. All copies of the Petitioner's movies, including multiple copies of same, and magazines did not have to be preserved for evidence. One copy is sufficient. The 2,143 copies were never used as evidence or otherwise in the criminal case.

Respondent misstates relevant uncontested facts in this case. Petitioner's civil suit against Respondent began *before* the return of the alleged obscene material and *during* the course of the criminal cases. Petitioner was *not* afforded a prompt adversarial hearing.

OBFUSCATION

The Brief in Opposition obfuscates the question presented by assuming police saying, "the mass seizures were for evidence gathering in a criminal prosecution" makes it so. The facts belie that premise. The mass seizures were for the purpose of seizing every adult movie in town (over 10 thousand movies in all four businesses) thus censoring all such material without a finding of obscenity before, during or ever after the mass seizure.

The Brief in opposition ducks the issue of the court's responsibility when the facts belie the government's stated excuse for the mass seizure of free speech material.

FACTUAL MISSTATEMENTS

1. "Following his arrest, Wallace exercised his right to a prompt Judicial determination of the obscenity issue, demanding the return of the seized property." (Brief in Opposition p. 2)

Wallace did make such demand promptly but no Judicial determination of *any* of the seized materials was *ever* afforded to Wallace, the movies or the public. Not one of the thousands of

seized movies was used in a criminal prosecution. Only two movies *purchased* before the mass seizure were used respectively in two criminal trials.

Of the 10,000 plus movies seized, only 2,134 were returned over two years later.

2. "Following his acquittal, each of the items which had been held as evidence in his criminal prosecutions were returned to Wallace.

"Wallace thereafter filed suit ... " (Brief in Opposition p. 3)

Long after acquittal, only on the eve of the two-year statute of limitations running, did Wallace file this suit and only *after* suit was filed were his seized movies returned (i.e. over two years after the mass seizure).

Note: the businesses that did not sue never got a determination of obscenity or the return of their 8,000 seized movies.

3. "Wallace acknowledges that he was provided an adversarial hearing on the obscenity issue following the seizure in this case, " (Brief in Opposition p. 5)

Nothing is further from the truth. Not one of the *seized* movies has been provided such a hearing. The two criminal trials only addressed two movies *purchased* prior to the mass seizure. Even though the *purchased* movies were not found obscene, the mass seized materials were held until this federal lawsuit secured their return years later. There was no criminal prosecution related to any of the seized movies.

CONCLUSION

The court has well established tests to determine when a mass seizure of speech material is done for the purpose of censorship rather than the stated excuse used by the government. The question presented by petitioner is:

> "Whether the bald assertion of 'evidence gathering for criminal prosecution' by police officers relieves the courts of their responsibility to enforce

> the well-settled law against mass seizures of presumptively protected speech material without inquiry into whether the facts support a claim the mass seizure was to censor free speech."

Though the Brief in Opposition does not address the question, it seems to be important because of the ongoing conflicts among the circuits and the lateral conflicts with the holdings of this Court. (See Petition for Writ of Certiorari "Reasons for Granting the Writ pp. 5-11)

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Greg Gladden
Counsel of Record
3017 Houston Avenue
Houston, Texas 77009
Phone: 713/880-0333
Fax: 713/880-4018
E-Mail: ggladden@neosoft.com